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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MEJIA,

Defendant and Appellant.

B205898

(Los Angeles County
Super. Ct. No. BA314363)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Stephen A. Marcus, Judge. Affirmed.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant Jesus Mejia suspected that his wife was having an affair with Juan C., his adult nephew. Appellant walked into the unlocked bathroom and stabbed Juan C. while he was using the toilet. Appellant was charged with one count of assault with a deadly weapon, a knife (count 1) and one count of attempted premeditated murder (count 2). The jury found him guilty as charged on count 1, but guilty of a lesser included offense, attempted voluntary manslaughter, on count 2. It also found that he inflicted great bodily injury on counts 1 and 2 and used a deadly weapon on count 2.

Appellant was sentenced to prison for a total of nine years six months. That sentence includes the upper term on count 2. He had no previous criminal record. He contends that the case must be remanded for resentencing because some of the reasons the trial court gave for imposing the upper term are improper. We reject the contention because, even though some of the reasons involved improper dual use of facts, the upper term was justified by the facts that Juan C. was an unusually vulnerable victim and the attack was unprovoked.

FACTS

1. Prosecution Evidence

Appellant, his wife Lili, and their three young children lived with appellant's sister Maria C., his brother Juan M.P., and his mother Maria M.P. Juan C. was Maria C.'s son. He had previously lived at that home and still visited it frequently. Appellant had told Juan C. not to come there any more, as he suspected that Juan C. was involved in a love affair with Lili. At the trial, Juan C. and Lili both testified that there was no such affair.

On December 19, 2006, Juan C. arrived at appellant's house around 6:00 p.m. His mother, Maria C., invited him inside to have something to eat. Appellant, Juan M.P., and Maria M.P. were also in the house at that time.

When Juan C. walked into the kitchen, appellant looked at him in an unfriendly way. Juan C. walked on into the bathroom and closed the door, which had no lock. He pulled his pants down and sat down on the toilet.

Appellant entered the bathroom, pushed Juan C.'s head down, kneed him, and stabbed him twice in the back. He said he was going to kill Juan C. for sleeping with his

wife. Juan C. had trouble breathing. Appellant tried to stab him in the neck. Juan C. put his hand out, so it was cut. He put his hands up and asked appellant to stop. Juan C. fell to the ground between the toilet and the wall. Appellant stabbed him in the arms, face, and hand.

At that point, Juan M.P. came into the bathroom and stopped the attack. Appellant calmed down and handed the knife to his mother. The police arrived and arrested him. His mother gave the officers the knife.

Juan C. went to the hospital in an ambulance. A chest tube was inserted for 24 hours, to drain air and blood from his punctured lung. He had a black eye, and there were lacerations on his hands and face that needed stitches. He stayed at the hospital for three days. When he testified at the trial over two years later, he still had shortness of breath and sometimes had pain where the chest tube had been inserted.

Juan M.P. told the police he intervened because he thought appellant was trying to kill Juan C., as he saw appellant slashing at Juan C. with the knife and kicking him in the head. At the trial, however, Juan M.P. denied that he talked to the police, and he described the incident differently, indicating that appellant accidentally stabbed Juan C. when Juan C. attacked him.

2. Defense Evidence

During cross-examination, Juan C. admitted that he was convicted in 2002 of committing “domestic violence” on his ex-wife.

Maria M.P. testified that appellant had complained to her that Lili and Juan C. were having long conversations. Suspicions of an illicit love affair had caused problems in the family for about a year. Maria M.P. further testified that she did not see the fight itself, but appellant handed her the knife afterwards.

Lili testified that appellant was not normally jealous or violent, but Juan C.’s unsought attention to her made appellant jealous.

3. Prosecution Rebuttal Testimony

Maria M.P. told the district attorney’s investigator that she went into the bathroom when she heard appellant and Juan C. arguing there. She saw appellant kick Juan C.,

who was seated on the toilet. A struggle ensued. Appellant's knife fell out of his pocket, he grabbed it, and he stabbed Juan C. in the face. She called out to Juan M.P., who stopped the fight.

DISCUSSION

Appellant was convicted of assault with a deadly weapon (count 1) and attempted voluntary manslaughter (count 2), plus intentional infliction of great bodily injury (§ 12022.7) as to both counts and use of a deadly weapon (§ 12022, subd. (b)(1)) on count 2.¹ The trial court imposed the upper term on count 1 but stayed that count. On count 2, it selected the upper term of five years six months, and then added three years for intentional infliction of great bodily injury and one year for use of a deadly weapon.

Appellant contends that the trial court failed to follow the applicable rules and relied on improper factors when it imposed the upper term, in violation of his federal and state constitutional rights to due process of law. (U.S. Const., 5th & 14th Amendments.; Cal. Const., art. I, §§ 7, 15; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [due process protection applies to arbitrary state action in exercise of discretionary sentencing choice].) He also maintains that the case must be remanded for resentencing because the mitigating factors “far outweighed any legitimate aggravating factor cited by the court.” He does not argue on appeal that imposition of the upper term would violate his United States Constitution Sixth Amendment right to trial by jury under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), and related cases.

1. The Record

The information alleged two aggravating circumstances, (1) crimes involving “great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness within the meaning of California Rules of Court Rule 4.421(a)(1),” and (2) a “particularly vulnerable” victim, “within the

¹ All code references are to the Penal Code unless otherwise stated.

meaning of California Rules of Court Rule 4.421(a)(3).” The jury was not asked to make a finding on those allegations.

The probation report showed that appellant had no previous criminal history. He was born in 1963. He had resided in the same house for 21 years and had worked as a painter for an apartment management company since 1981. The probation officer recognized that appellant had “long-term local community ties, close and supportive local family ties, good residential and employment stability, and that he has no known history of violence, criminal activity and/or anti-social behavior.” Appellant stated that Juan C. had “a history of exhibiting overly aggressive and assaultive behavior upon others, including his own mother.” It appeared that appellant was legally ineligible for probation. The report “strongly recommended” a commitment to the Department of Corrections pursuant to section 1203.03, to provide additional information about the appropriate sentence. If the court was not inclined to make that referral, imposition of a middle term sentence was recommended, as there were three circumstances in aggravation and three circumstances in mitigation.²

The sentencing hearing occurred on January 29, 2008. Defense counsel argued for the low term because (a) appellant had no prior criminal history, (b) the verdict for the lesser included offense meant the jurors believed appellant acted from heat of passion, and (c) it was sufficient that four years would be added due to the combination of the great bodily injury and deadly weapon enhancements.

² “Circumstances in aggravation: [¶] 1. The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness. [¶] 2. The defendant was armed with or used a weapon at the time of the commission of the crime. [¶] 3. The planning, sophistication or professionalism with which the crime was committed, or other facts, indicated premeditation. [¶] Circumstances in mitigation: [¶] 1. The defendant has no prior record or an insignificant record of criminal conduct considering the recency and frequency of prior crimes. [¶] 2. The defendant was suffering from a mental or physical condition that significantly reduces his culpability for the crime. [¶] 3. The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.” (Boldface omitted.)

The prosecutor sought the high term plus the enhancements, on the ground that appellant almost killed Juan C., “who ended up with a punctured lung.”

The trial court then indicated its thinking, as follows:

“THE COURT: I have to tell you, Mr. Cavalluzzi [defense counsel], I’ve been [deciding] between mid and high term. There’s no possibility I’m giving this individual low term, and I’m really leaning to high term, and this is the reason why. [¶] The crime involved great violence, great bodily harm. He got the benefit of his acting under the stress of provocation, or in a quarrel. He got the benefit of that when they returned their verdict. But now I have to look at actually what he did. [¶] He attacked somebody that was in a bathroom, going to the bathroom, and he attacked him with a knife, and he stabbed him seven times. And there was no warning that he was going to do this. This wasn’t actually in a fight. I mean, it was an unprovoked attack, from the court’s position. He was armed with a weapon, which is another factor in aggravation. The victim at the time that he attacked the victim was particularly vulnerable. He had his back to the defendant. He was going to the bathroom. [¶] And so that’s the problem I have with this case. The one factor you pointed out is very true. He has, I believe -- I haven’t looked recently, but I believe he has no record.”

Defense counsel reminded the court that appellant had no record. The court continued: “No prior record. And that is certainly a factor that I think goes in his favor, but the other factors are very -- are quite a concern. [¶] And, frankly, from the testimony, had he not had his brother and other people break up the situation, I believe he might have been more successful in what he was attempting to do, and that is really, really hurt the victim in this case.”

The court permitted further argument by counsel. The following discussion ensued:

“MR. CAVALUZZI: Your Honor, to deviate from mid term, I think, would be highly inappropriate in this case, and my objections would be based also on *Cunningham*. If the court were to depart, I understand we have the -- the -- the jury finding him guilty of the great bodily injury and have the jury finding him guilty of the use of a weapon; but that’s an additional four years based on those factors set forth by the jury. [¶] And I would argue to an extent on *Cunningham* that, with no other factors found by the jury to warrant increase above the seven years, that the court would be to an extent violating the Constitution, at least would be my argument, to

deviate above to the nine and a half years on this particular case, especially considering what we have here is an individual with no prior record. [¶] And it seems to me, according to *Cunningham*, at least largely, that that's the only factor that's been relied upon that -- that the court hasn't come back and said clearly that it would be inappropriate to increase one's sentence based on. [¶] A lot of the factors the court has mentioned -- the fact that he had his back turned or the fact that he was particularly vulnerable or even the fact that, as the court said, if the other individuals [had]n't g[otten] involved, some more serious injury would have occurred -- those are factors that have not been proven by the jury, have not been found to be beyond a reasonable doubt. And I would argue that it would be inappropriate for the court, based on those factors that the court has stated as its reasons for increasing the sentence, to increase the sentence.

“THE COURT: Well, it's my understanding that *Cunningham* no longer applies, that as of April of last year, the Legislature voted and said that we can choose low, mid, or high term. And the only thing we have to do is state our reasons. I have indicated what my reasons are.

“MR. CAVALLUZZI: But the reasons that the court has given -- at least I would argue and object that those reasons are factors that have been found to be inappropriate for the court to rely on in deviating from the sentence. We have an individual here who -- I understand the court's concern on this -- but has no prior criminal history, was found guilty of these specific charges, being punished for the factors the court has named already as far as the GBI [great bodily injury] or use of a weapon. His sentence is already increased for that. [¶] And I understand what the court is stating, but I would argue that, considering the reasons the court has placed on the record --

“THE COURT: Those are the reasons I'm going to rely on. I'm not -- I mean, I'm not going to change my reasons. You're absolutely right that those are the reasons I'm going to be relying on.

“MR. CAVALUZZI: But, Your Honor, I would argue that to increase the sentence based on those reasons would be a violation of *Cunningham*, and I'm objecting on those grounds if the court does decide to -- to give something other than mid term in this case.”

At that point, the court asked the prosecutor if he had anything to add. He did not. The court then imposed its sentence, which included the upper term on both counts, with count 1 stayed pursuant to section 654. It added that it realized it was imposing the upper term over a *Cunningham* objection, and if *Cunningham* applied, the sentencing would be

reversed. The court took “the position that *Cunningham* does not apply, that because of the new statute that was enacted by the Legislature in April, we have the right to choose between . . . low, mid, and high term. [¶] And the three reasons I gave are the reasons I’m choosing -- that the crime involved great violence, great bodily harm, threat of great bodily harm; the defendant was armed with and used a weapon, but I guess as you pointed out, he is being punished one year for the weapon; and the third factor is the victim was particularly vulnerable. And the other factor I would use is that he had stabbed the victim numerous times and was only stopped by his brother. That was the only thing that stopped him, was somebody else stopping him. [¶] So for those reasons the court feels that the high term is appropriate. This was a fairly vicious crime, and he’s left a very injured victim. And, frankly, from the court’s perspective, I realize the jury did find, I suppose, that his thoughts or something about the affair were reasonable, and I suppose you could hold that belief; but I still believe that, even if you believe your wife is having an affair, even though apparently it’s not even true in this case, this is not the appropriate conduct to -- this is not the way to respond, to jump into a bathroom when someone is going to the bathroom, and stab them seven times. I just -- anyway, I just disagree.”

2. Analysis

Appellant maintains that the trial court engaged in improper dual use of facts and abused its discretion when it imposed the upper term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c) & (d); *People v. Scott* (1994) 9 Cal.4th 331, 350.)

As a preliminary matter, we find that defense counsel’s strenuous objections below adequately preserved those issues for the appeal.

On count 2, the trial court imposed the upper term for attempted voluntary manslaughter, with enhancements for intentional infliction of great bodily injury and use of a deadly weapon. Its stated reasons for the upper term included: (1) “Great violence,” (2) “great bodily harm,” (3) “an unprovoked attack,” (4) “arming with a weapon,” (5) “the victim was particularly vulnerable,” and (6) appellant “stabbed the victim numerous times and was only stopped by his brother.”

The California Supreme Court has not yet resolved whether the prohibition against dual use of facts was affected by the amendment of section 1170, subdivision (b). That amendment includes this sentence: “The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” The Judicial Council’s Advisory Committee Comment to California Rules of Court, rule 4.420 indicates: “It is not clear whether the reasons stated by the judge for selecting a particular term qualify as ‘facts’ for the purposes of the rule prohibition on dual use of facts. Until the issue is clarified, judges should avoid the use of reasons that may constitute an impermissible dual use of facts. For example, the court is not permitted to use the reason to impose a greater term if that reason also is either (1) the same as an enhancement that will be imposed, or (2) an element of the crime.”

The parties dispute which of the factors utilized by the trial court constituted an allegedly improper dual use of facts. It appears to us that, as defense counsel argued below, at least two of those factors, “great bodily harm” and “arming with a weapon,” duplicated the enhancements that were imposed for intentional infliction of great bodily injury and use of a deadly weapon.

We do not analyze the issue in greater detail because “the finding of even one factor in aggravation is sufficient to justify the upper term.” (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.) Juan C. was using the toilet when appellant walked into the unlocked bathroom and stabbed him. As in *People v. Steele* “[e]ven if some of the factors were impermissible, it is difficult to assail the finding that the victim was vulnerable.” (*Ibid.*) Indeed, appellant’s brief “does not dispute the court’s reliance on the ‘vulnerability’ factor.”

The facts also unquestionably show that the attack was “unprovoked,” another aggravating factor named by the trial court that has no dual use implications.

The facts of this case therefore justify the conclusion that any error regarding dual use of facts was harmless.

Moreover, the trial court was well aware of the mitigating factors, including appellant's lack of prior criminal record, but it believed that, when all the circumstances were considered, the upper term was appropriate. We find no abuse of discretion in that determination.

DISPOSITION

The judgment is affirmed.

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FLIER, Acting P. J.

We concur:

BIGELOW, J.

O'NEILL, J.^{*}

* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.